

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

*Original & Affidavit of
Mailing*

77-

To be argued by
JONATHAN M. MARKS

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-8165

UNITED STATES OF AMERICA,

—against—

RAYMOND DAVID WEAN,

Appellee,

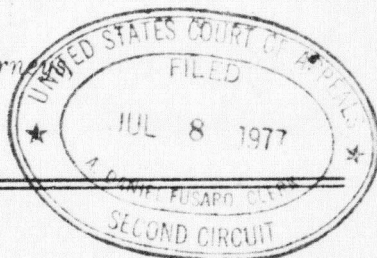
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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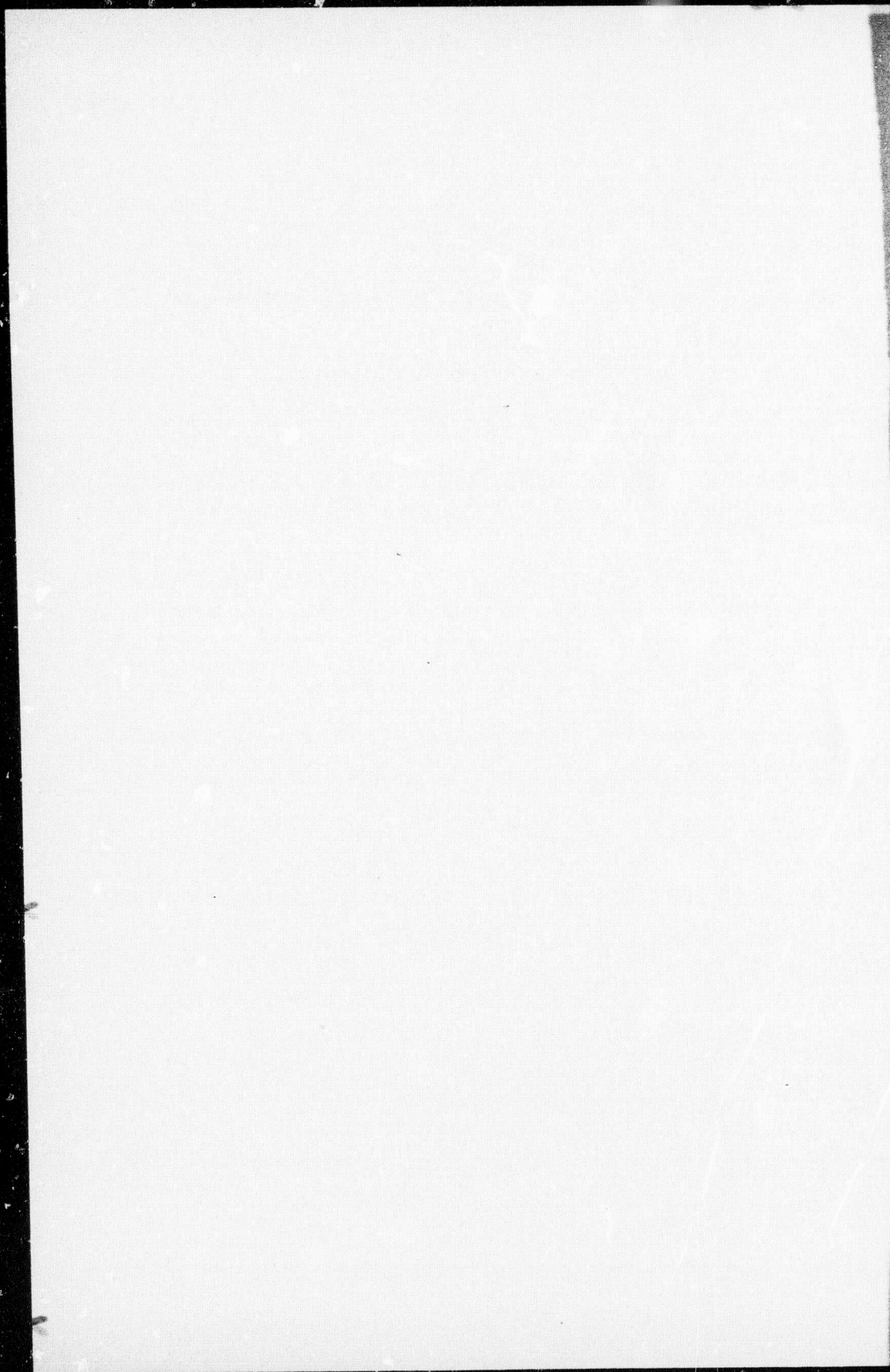
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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-8165

UNITED STATES OF AMERICA,

Appellee,

—against—

RAYMOND DAVID WEAN,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Raymond Wean appeals from a judgment of conviction entered March 10, 1977, in the United States District Court for the Eastern District of New York (Neaher, J.) after a four-day jury trial, convicting him of possession on March 11, 1975, of a truckload of stolen goods constituting an interstate shipment, in violation of 18 U.S.C. § 659. Appellant was sentenced to three years imprisonment and is currently on bail pending this appeal.

On appeal, appellant claims that he is entitled to a new trial because (a) the Government's failure to make pre-trial disclosure of alleged exculpatory evidence and (b) an unanswered question by the prosecutor concerning appellant's arrest record denied him a fair trial.

Statement of Facts

A. The Government's Case

On March 11, 1975, shortly before 9:00 in the morning, Salvatore Taboh, a driver for Hemingway Transport Company, parked his tractor trailer on 27th Street between Fifth Avenue and Broadway in Manhattan and left the truck in order to make a delivery. Upon returning about ten minutes later, Taboh found that the truck had been stolen (Tr. A. 3, 6-8).¹ Mr. Taboh immediately notified the police and his dispatcher of the theft (Tr. A. 7).²

Patrick Colgan, a Special Agent with the F.B.I., was in Queens in a Government car when he received a message over his two-way radio that the stolen truck had been spotted in Maspeth. Colgan arrived in Maspeth at about 9:45 a.m. and saw the Hemingway truck parked on Rust Street just north of Maspeth Avenue (Tr. A. 24-26). There was no one in the tractor at that time (Tr. A. 26). Between 10:00 a.m. and 10:15 a.m., he observed the appellant get into the cab of the truck, drive north on Rust Street, make a U-turn, proceed South on Rust Street and make a right turn onto Grand Street. Agent Colgan followed the truck until it came to a stop. Colgan

¹ Testimony at trial was taken on November 22, 23 and 24, and summations and the charge were given on November 29, 1976. The following designations are used to refer to the trial transcripts: "Tr. A"—transcript of testimony of November 22, 1976; "Tr. B"—transcripts of November 23-29, 1976, which are consecutively paginated. "A." refers to the Government's Appendix. "App. A" refers to Appellant's Appendix. "Br." refers to Appellant's brief.

² Robert G. Machette, a director of security for Hemingway Transport, testified that the truck contained goods valued at approximately \$23,800 (Tr. 12, 14). It was stipulated that the goods were moving in interstate commerce (A. 25-27).

observed the appellant get out of the cab, placed him under arrest and had him wait in a Bureau car (Tr. A. 28-33).³

Special Agent Robert Nadler of the F.B.I. testified that he arrived at Grand Avenue in Maspeth at about 11:00 a.m. and saw the appellant seated in the F.B.I. car (Tr. A. 51). Nadler found a set of keys in the ignition of the Hemingway truck (Tr. B. 51-52). A stipulation was read to the jury to the effect that if Richard Peterkin, a licensed locksmith, were called, he would testify that the keys were master blanks used in truck ignitions of various manufacture (Tr. B. 77). Special Agent Stephen Morrill, of the F.B.I., testified as to a photograph he took of the stolen tractor trailer.

B. The Defense Case

Dorothy Wean testified that she has been divorced from the appellant since 1968. On March 11, 1975, a little after 9:00 a.m., Mrs. Wean called the appellant to ask him to come to her house in Maspeth, Queens. Appellant told her that he would be over shortly, but he never arrived (A. 33-41).⁴ The defense also called Kathleen Wean, the defendant's wife at the time of trial. She testified that on March 11, 1975, at about 8:30 a.m., the appellant received a telephone call from his ex-wife. Appellant then told Mrs. Wean and a friend of theirs, Christopher Rudan, who was at their house, that he had

³ Colgan also testified that he saw a Cadillac driven by one Joseph Massino following the truck and thereafter saw the appellant and Massino in conversation (Tr. A. 32, Tr. B. 27). After his arrest, the appellant denied knowing Massino (Tr. B. 50). However, Kathleen Wean testified on cross-examination that Massino is an old friend of appellant's (Tr. B. 117).

⁴ The testimony is more fully developed in connection with Point II, *infra*.

to visit his ex-wife's house in Maspeth. The appellant and Rudan left the house shortly after 9:30 a.m. (Tr. B. 102-104).

Christopher Rudan, a friend of the appellant's for about ten years, testified for the defense (Tr. B. 144-145). He stated that on the morning of March 11, 1975, he drove the appellant to Maspeth. Their intended destination was the appellant's ex-wife's house, but they went past the exit on the Long Island Expressway nearest her house and, instead, got off at the next exit because Rudan decided to visit an old girlfriend (Tr. B. 144-146, 150). Rudan further testified that appellant got out of the car on Grand Avenue and 54th Street in Maspeth at about 10:30 a.m. (Tr. B. 152-153).

C. The Koerner "302"⁵

Prior to the trial, which began on Monday, November 22, 1976, the prosecutor turned over the "3500" material pertaining to each witness (Tr. A. 7A). On the first day of trial, fifty-one (51) pages of testimony were taken. The next morning, November 23rd, before resumption of the trial itself, Robert Weiswasser, Esq., appellant's trial counsel, made an application to the court for additional grand jury testimony of Stephen Morrill, an F.B.I. Agent, who had testified the day before. (The materials turned over earlier indicated that there might be other testimony of Agent Morrill.) In response to a direction by the court to make available all the statements of Agent Morrill, the Government turned over all grand jury minutes relating to the case and the entire F.B.I. case report, which included the statements of additional agents and others whom the Government did not intend

⁵ This evidence, although ultimately introduced on the defense case, is treated separately inasmuch as the circumstances surrounding its production constitute Point I on this appeal.

to call as witnesses. Also included in this file was an F.B.I. "Form 302" containing a statement of an interview with one Frank Koerner (A. 9).

In substance, the report stated that on March 11, 1975, at approximately 9:30 a.m., Mr. Koerner, a truck driver, received a radio communication in his truck to the effect that a Hemingway tractor trailer had been stolen. He saw the stolen tractor trailer about twenty minutes later parked at Rust Street and Maspeth Avenue, in Maspeth, Queens. Koerner notified his dispatcher, who directed him to keep the tractor trailer under observation. Koerner did so from a distance of about three hundred feet. From that distance, Koerner saw someone enter the cab of the truck. The Hemingway tractor trailer then proceeded past Koerner's truck, made a U-turn, proceeded towards Grand Avenue and made a right turn on Grand, pulling to the curb at 56th Street. Koerner states that "he did not get a good look" at the driver of the tractor trailer. The report does not relate that Koerner furnished any description of the driver. It does state that when a spread of ten photographs, including one of the defendant, was shown to him, Koerner was unable to identify anyone as the driver of the truck. (The report is reproduced in Appellant's Appendix at pages 9a-10a.)

After reading the report, Mr. Weiswasser complained that the report constituted *Brady* material and that it should have been disclosed earlier. At this point, counsel stated that a continuance to Friday November 26, 1976 might be necessary (A. 12).

Defense counsel then said that he wanted to send an investigator out to see Mr. Koerner. The Assistant United States Attorney notified counsel that Koerner had just come out of the hospital after having had a lung removed. (A. 12-13). The case agent stated that Koerner had been released from the hospital a month and a half or two months before (A. 14).

Mr. Weiswasser reported that he spoke to Mr. Koerner during the luncheon break and that he was too sick to come to Brooklyn from his home in Lindenhurst, Long Island (A. 15a).

The Assistant United States Attorney suggested that Mr. Koerner's deposition be taken that afternoon (A. 15c). The court suggested that it be held on Friday, November 26, instead, and counsel agreed (A. 15d-15e). Later that day, the Assistant United States Attorney again stated that a deposition could be taken of Mr. Koerner (Tr. B. 119). He also suggested the possibility that Mr. Koerner's testimony could be introduced by stipulation. Mr. Weisswasser replied that "nothing could thrill me greater" (Tr. B. 121).

On the evening of November 23, the attorneys for the appellant and the Government had a three-way telephone conversation with Mr. Koerner. Thereafter, they reduced his testimony to a stipulation, which they re-read to him line by line, asking him to affirm or deny each allegation in the stipulation (A. 20-21). The final stipulation, along with the Koerner "302," was received in evidence as part of the defense case (App. A. 32a).

Contrary to appellant's claim, Mr. Koerner had a clear recollection of the events of March 11, 1975. There had been no deterioration of his memory. It was uncontroverted that Mr. Koerner answered the questions put to him by counsel on the telephone "with great clarity and great specificity" (A. 21), as evidenced by the detailed stipulation based on the telephone conversations with him (App. A. 32-35a). There is nothing in the record to explain why defense counsel did not take Koerner's deposition.

Indeed, even after the stipulation was agreed to, the Assistant United States Attorney said: "I am ready and willing to go out to Lindenhurst at any time to depose

Mr. Koerner" (A. 21). Defense counsel never pursued this alternative, but instead chose to rely solely on the stipulation and the F.B.I. report of the Koerner interview. Mr. Weiswasser made no further request to depose Mr. Koerner, nor does the record show that the defense made any attempt to interview him in person.

ARGUMENT

POINT I

The District Court Properly Denied Appellant's Motion For A Mistrial Based On The Allegedly Untimely Disclosure Of Brady Material.

The facts concerning the Koerner report are fully set forth in the Statement of Facts (pp. 4-7, *supra*). In substance, the Koerner 302 stated that Koerner observed the driver of the Hemingway truck from 300 feet away as the driver was getting into the cab, that he did not get a good look at him and that Koerner was unable to identify the appellant from a photospread. The report contained no description whatsoever of the driver.⁶

Assuming that the Koerner "302" was *Brady* material,⁷ disclosure was timely made, and the appellant can-

⁶ Appellant's suggestion to the contrary (Br. 12) is in error.

⁷ Arguably the report is not exculpatory within the meaning of *Brady v. Maryland*, 373 U.S. 83 (1963). We do not press this argument but meet the issue as discussed in the text. However, analysis of the cases cited shows that they are inapposite. Thus, in *Grant v. Alldridge*, 498 F.2d 376 (2d Cir. 1974), an eyewitness identified a man in a photospread other than the defendant as the person who had committed the crime charged. In *Application of Kapatos*, 208 F. Supp. 833 (S.D.N.Y. 1962), two eyewitnesses stated positively that the defendant was not

[Footnote continued on following page]

the person involved in the crime. In *United States ex rel. Meers v. Wilkins*, 326 F.2d 135 (2d Cir. 1964), involving the robbery of a store, an eyewitness stated that the defendant was not in the store on the night of the robbery. In all of the above cases, the information suppressed by the prosecution involved statements that the defendant was definitely not the person who committed the crime or that someone else was. In the instant case, Koerner said he did not get a good look at the driver and could not identify him.

Appellant also relies on *Jackson v. Wainwright*, 390 F.2d 288 (5th Cir. 1968), an assault case, as "substantially similar" to this case. There, the defendant was black. An eyewitness said that the assailant was "not a Negro". That statement was held to constitute *Brady* material. The court remanded the case for a new trial on the ground that the exculpatory evidence had not been disclosed. Here, all that Koerner said is that he did not get a good look and that he could not identify the appellant. Moreover, as discussed below, that statement was made available to appellant in sufficient time for him to make effective use of it at trial.

The other cases cited by appellant are wholly inapposite: *Mooney v. Holohan*, 294 U.S. 103 (1935) and *Napue v. Illinois*, 360 U.S. 264 (1959) (failure to disclose that the prosecutor knew certain testimony to be false); *United States v. Miller*, 529 F.2d 1125 (9th Cir.), *cert. denied*, 426 U.S. 924 (1976), (suppression of a confession by a person other than the defendant to filing false tax returns); *United States v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971); *United States v. Brawer*, 496 F.2d 703 (2d Cir. 1974); *Levine v. Clark*, 408 F.2d 1209 (D.C. Cir. 1967); *United States v. Bowles*, 488 F.2d 1307 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 991 (1974), and *United States v. Polisi*, 416 F.2d 573 (2d Cir. 1969), (suppression of statements made by witnesses contradicting prosecution witnesses); *United States v. Gerard*, 491 F.2d 1300 (9th Cir. 1974) and *United States v. Pfingst*, 490 F.2d 262 (2d Cir. 1973), *cert. denied*, 417 U.S. 919 (1974) (failure to disclose assurances made to Government witnesses); *United States v. Pollack*, 534 F.2d 964 (D.C. Cir.), *cert. denied*, 429 U.S. 924 (1976) (failure to disclose an indictment pending against a Government witness); *United States v. Miller*, 411 F.2d 825 (2d Cir. 1969) (non-disclosure of hypnosis of a Government witness prior to trial); *United States v. Henry*, 528 F.2d 661 (D.C. Cir. 1976) (suppression of a pretrial mental examination); *United States v. Cobb*, 271 F. Supp. 159 (S.D.N.Y. 1967)

[Footnote continued on following page]

not claim that he was prejudiced by the fact that it was not made available until the morning of the second day of trial. As Judge Neaher found, there was no question of "improper motives" on the part of the prosecutor (A. 22). Indeed, Mr. Weiswasser conceded at trial that "I don't believe there is any bad faith on the part of the Government in this matter." (A. 17).

The general rule in this Circuit is that *Brady* material need not be disclosed before trial. In *United States ex rel. Lucas v. Regan*, 503 F.2d 1 (2d Cir. 1974), *cert. denied*, 420 U.S. 939 (1975), the defendant, who was on trial for robbery, moved for a mistrial on the ground that a denial of his motion for continuance in order to locate a material witness had been denied. A woman identified a man named Bryant as the robber. Shortly thereafter, she was shown the defendant. The witness then stated that she was mistaken in her earlier identification and that the defendant was the robber. Defendant did not learn of the previous misidentification until one year later, on the second day of trial. In holding that the trial court was not in error in refusing to grant a continuance, the Court of Appeals stated:

Appellant claims that under *Brady v. Maryland*, the prosecution was required to disclose this information before trial and that if this had been done the defense would have had ample time to locate Bryant. *Neither Brady nor any other case we know of requires that disclosure under Brady must be made before trial.* We would need a much more convincing showing that it would have been impossible to locate Bryant in the time available

(failure to disclose the identity of Government informants); *United States v. Wolfson*, 322 F. Supp. 798 (D. Del. 1971), *aff'd*, 454 F.2d 60 (3d Cir.), *cert. denied*, 406 U.S. 924 (1972) (failure to disclose the presence of an expert witness); *United States v. Hibler*, 463 F.2d 455 (9th Cir. 1972) (suppression of inconsistent statements of a police officer).

after disclosure before we would be willing to entertain such a claim. (Emphasis added.)

503 F.2d at 3, n.1.^{*}

Appellant contends that because Koerner was recovering from surgery, he was not available to be interviewed or deposed or to view the appellant in a show-up or otherwise (Br. 7). This simply is not so. There was ample opportunity to interview or depose Mr. Koerner at his house and to take the appellant along, if counsel wanted. But counsel at no time sought to do so.

Court adjourned early in the afternoon of Wednesday, November 24, and did not reconvene until the following Monday. Defense counsel could have interviewed Mr. Koerner anytime during that three and one-half day period, but he did not. Nor did defense counsel ever ask for additional time in which to do so. On three separate occasions, the Assistant United States Attorney proposed that Mr. Koerner's deposition be taken, but defense counsel did not avail himself of that opportunity (A. 15c; Tr. 119; A. 22). Instead, appellant chose

^{*} But see, *Grant v. Alldridge*, 498 F.2d 376, *supra*, and *United States v. Deutsch*, 373 F. Supp. 289 (S.D.N.Y. 1974). In *Grant v. Alldridge*, the Government suppressed evidence of an incorrect prior eyewitness identification. In holding that such evidence should have been disclosed before trial, the Court stated:

Although it well may be that marginal *Brady* material need not always be disclosed upon requests prior to trial, the fact that Miss Harris had selected Walsh as a suspect was without question "specific, concrete evidence" of a nature requiring pre-trial disclosure to allow for full exploration and exploitation by the defense.

498 F.2d at 382.

In the case of an incorrect prior identification, it may take considerable time to locate and interview the person identified. Here, there is no claim of mis-identification requiring "exploitation and investigation" by the defense, nor was there insufficient time to interview and fully develop Mr. Koerner's recollection.

to rely on a detailed stipulation based on several telephone conversations with Mr. Koerner and on the Koerner "302" (App. A. 32a-35a, 9a-9b).

Since the Koerner report was given to appellant in time for counsel to make effective use of it and since he never sought to depose Koerner, appellant's argument that he was prejudiced by the failure of the Government to make the report available earlier is without merit. Indeed, counsel had stated that he might need a continuance to Friday, November 25, which in effect he received. No further continuance—for any purpose—was sought.

Koerner, while unavailable to testify in court because he was recovering from surgery at home, was available to be deposed and to view the appellant. While Mr. Koerner's unavailability as a witness in court did not prejudice the appellant, we note in passing that the Government had no way of foreseeing Mr. Koerner's inability to testify in court. The lack of prejudice is particularly apparent from the fact that defense counsel elected not to depose Mr. Koerner or to have him view the appellant.

Although it could not have been anticipated from a reading of the Koerner "302", Koerner told counsel that he believed the driver to be of medium height and build, whereas the appellant was stocky and tall. That statement of Koerner was read to the jury in the form of a stipulation (App. A. 32a-35a). Appellant now speculates that "[i]f Mr. Koerner could have viewed the defendant, it is certainly reasonable to assume that Mr. Koerner could have stated unequivocally that the defendant was not the driver on the basis of the defendant's very large size and heavy weight" (Br. 7). This is pure conjecture with no basis in the record.

Appellant chose to rely on the stipulation. There was nothing to prevent defense counsel from having Mr. Koer-

ner view the appellant, but he decided, apparently for tactical reasons, not to do so. Appellant should not now be permitted to have it "both ways." Otherwise this Court would be sanctioning "'sand bagging' on the part of defense lawyers who may take their chances on a verdict of not guilty" in the hope of succeeding on a later new trial motion or appeal "if their initial gamble does not pay off." Cf. *Wainwright v. Sykes*, — U.S. —, 45 U.S.L.W. 4807, 4812 (decided June 23, 1977). In light of counsel's failure to take advantage of the opportunity to do so, appellant cannot base his appeal on mere speculation as to what might have happened if Koerner had viewed the appellant.

Finally, appellant claims that Mr. Koerner, who had had his lung removed, was taking pain killers and tranquilizers and was in no condition to "concentrate on the problems concerned with this trial" (Br. 4). The prosecutor, on the other hand, who participated in the three-way telephone conversations which resulted in the stipulation entered at trial, stated that there had been no deterioration of Mr. Koerner's memory and that Mr. Koerner had answered the questions put to him "with great clarity and great specificity" (A. 21). The detailed nature of the stipulation supports the Government's claim (App. A. 32a-35a).

In sum, the Government fulfilled its duty under *Brady* by giving the Koerner report to appellant at the beginning of the second day of trial, and appellant cannot now complain that he had insufficient time to make effective use of it in view of the fact that his trial counsel chose *not* to interview or depose Koerner and did not seek additional time over and above the more than three days available to him. Thus, appellant was not prejudiced by the disclosure of the Koerner 302 on the second day of trial.

POINT II**The Prosecutor's Unanswered Question Concerning Appellant's Previous Arrest Does Not Warrant Reversal.**

(1)

Appellant's former wife, Dorothy Wean, was called by appellant. Mrs. Wean's testimony can be briefly summarized. She was divorced from the appellant in 1968. On March 11, 1975, at approximately 9:00 A.M., she telephoned her ex-husband to ask him if he would come over to her house in Maspeth to help with her son, who was misbehaving in school. The appellant said that he would come over but he never arrived (A. 33-35). On cross-examination, Mrs. Wean admitted that her son was frequently boisterous in school, that nothing unusual happened that day, but that it was the anniversary of her marriage which had ended seven years before (A. 36-38). She could not remember anything that happened on March 12, 1975 (A. 39-40). Nor could she remember anything about the events of her anniversary in 1973, 1974 or 1976 (A. 53). On re-direct, Mrs. Wean testified that her ex-husband had not been arrested on either March 11 or March 12 (A. 48a-49). Mr. Weiswasser then asked Mrs. Wean the following question:

Is it a fair statement to make that you are testifying not as to the exact date of March 11, but the date you found out your husband was arrested—(A. 49).

An objection to the question as leading was sustained. Mrs. Wean thereafter testified:

Q. Mrs. Wean, are you sure it was March 11, 1975 that your husband was arrested?

A. Yes.

Q. How do you fix that date?

A. The only way I can fix it, it happens to be my anniversary. (A. 49-50).

On re-cross, Mrs. Wean was then asked the following question:

This wasn't the first time your husband was arrested, was it——(A. 50).

There was an immediate objection and the question was never answered. After sustaining the objection, the court gave the following curative instruction to the jury:

THE COURT: Members of the jury, I'm going to instruct you to erase from your minds the last question by Government counsel. People are arrested for many things. Some of them quite inconsequentially and many times, with no foundation, as we all know.

It is not something that you should allow to remain in your minds in connection with your consideration on the evidence in this case. I'm trying to impress on you as firmly as I can.

* * * * *

Also, it goes without saying that the mere fact that the defendant was asked, is no evidence that he was in fact arrested.

Bear that in mind (A. 52-53).

This question was prompted by defense counsel's line of examination which was designed to show that Mrs. Wean was "not testifying as to the exact date of March 11, but the date [she] found [appellant] was arrested" (A. 49) and that it was appellant's arrest that distinguished March 11, 1975, in the witness's mind. In fact, as the prosecutor knew, appellant had been arrested "many, many times" (A. 51) and thus there was a good faith

basis and reason for asking the question. The prosecutor, although perhaps over-zealously, was seeking to establish that the witness had no basis for remembering this particular event, since her ex-husband had been arrested on many other occasions (A. 51).

While we concede that this particular question was improper, the fact that it was not answered and promptly followed by a curative instructive renders the error, we submit, harmless.

(2)

Appellant argues that notwithstanding the fact that the question was never answered and that a strong curative instruction was given, the very asking of the question constitutes reversible error. We disagree.

Appellant erroneously relies on *United States v. Rinaldi*, 301 F.2d 576 (2d Cir. 1962). In that case, the prosecutor asked defendant's wife, a defense witness, if her husband had *ever been convicted* of a crime. She answered that he had been. The Court found that there was no legitimate basis for offering proof of the prior conviction and reversed. This case is distinguishable from *Rinaldi*. First, here defense counsel opened the door to the question by attempting to establish that March 11, 1975, was a day Mrs. Wean would remember because appellant was arrested on that day. Second, in *Rinaldi* the improper question concerned a conviction, not merely an arrest. Third, and most significantly, the question there was answered, while here it was not.

In *United States v. Apuzzo*, 245 F.2d 416 (2d Cir.), *cert. denied*, 355 U.S. 831 (1957), defense counsel's cross-examination of a government witness inadvertently revealed the defendant's arrest record. The judge gave the following curative instructions:

[A]t the close of the last session there was a witness on the stand who was asked a question by counsel for the defense and in answering the question said something about the previous arrest of the defendant.

* * * * *

"Now, the reason that the law does not permit testimony with respect to previous arrests is that an arrest means absolutely nothing, just as I told you at the beginning of the case, a man is presumed to be innocent until he is found guilty, and the arrest is nothing more than the information that I was talking to you about, so that it has no bearing on the question in the eyes of the law. And you are to disregard anything you heard.

* * * * *

"Any testimony as to any previous arrest may be disregarded as having no probative value as to the guilt or innocence of the defendant."

245 F.2d at 420 n.4. This Court, sitting *en banc*, held that the quoted instructions cured any prejudice which might have resulted from the testimony concerning the arrest. Judge Neaher's instruction in the instant case is substantially identical to the charge approved in *Appuzzo*. This is an *a fortiori* case, for here there was no inadvertent disclosure. We submit that the similar strong curative instruction in this case ameliorated and, indeed, removed any prejudice which would have necessitated a new trial.

This Court has frequently held that prejudice can be cured by an appropriate instruction. In *United States v. Giallo*, 206 F.2d 207 (2d Cir. 1953), *aff'd*, 346 U.S. 929 (1954), a government witness had referred to the fact that the defendant was "out on bail" prior to his arrest on the charges for which he was standing trial. The trial court gave a prompt curative instruction. This Court

affirmed the conviction. See also, *United States v. Stromberg*, 268 F.2d 256 (2d Cir.), cert. denied, 361 U.S. 863 (1959).

Certainly, an unanswered improper question may constitute reversible error, but this must be determined on a case-by-case basis. Thus, it is not helpful to merely argue, as appellant does, that the question, if determined to be improper, constitutes reversible error. For example, in each of the two cases cited by appellant, the Courts of Appeal analyzed the questions involved. In *Thurman v. United States*, 316 F.2d 205 (9th Cir. 1963), the Ninth Circuit held that suggestive questions concerning *specific acts of criminal conduct*, not resulting in convictions, constituted grounds for reversal. In *United States v. Provoo*, 215 F.2d 531 (2d Cir. 1954), the prosecutor asked the defendant multiple questions concerning whether the cause underlying the defendant's several hospitalizations and incarcerations was his homosexuality, and these questions were answered, but in the negative. However, unlike *Thurman* and *Provoo*, the prosecutor here did not ask about *specific acts*. The question was whether the March 11 *arrest* was appellant's only arrest; the jury was not given a hint as to the nature of appellant's prior arrests. Moreover, the one-page opinion in *Thurman* does not indicate whether a curative instruction was given by the trial judge. Here, even if the question had been answered, the prejudice would not have been so great that it could not be cured by a prompt cautionary instruction. See *United States v. Apuzzo*, *supra*. Thus, since the question was not answered, any resultant prejudice was dissipated by the prompt and strong cautionary instruction.

In sum, this single unanswered question, immediately followed by a curative charge, was not so prejudicial as to warrant reversal. This is particularly so in light of

the testimony of Agent Colgan that he caught the appellant "red-handed" as he stepped out of the cab of the stolen tractor trailer. Thus the error, at worst, was harmless.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
July 5, 1977

Respectfully submitted,

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* The United States Attorney's Office wishes to express its appreciation to Priscilla Elliott, a third-year student at Brooklyn Law School, for her assistance in the preparation of this brief.

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DOLORES M. BYRD

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BRIEFFOR THE APPELLEE

cing the same in a properly postpaid franked envelope addressed to:

ROBERT J. WEISWASSER, ESQ.

32 COURT STREET

BROOKLYN, NEW YORK 11201

ponent further says that he sealed the said envelope and placed the same in the mail chute
or mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Brooklyn~~, Borough of Brooklyn, County
gs, City of New York.

Dolores M. Byrd

to before me this

day of July 19 77

Barbara A. Allen

BARBARA A. ALLEN
y Public, State of New York
No. 24-4646824
ualified in Kings County
ission Expires March 30, 1979

